CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 856. 117.

THE UNITED STATES, APPELLANT,

vs.

M. SALAMBIER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 3, 1896.

(13,000.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 879.

THE UNITED STATES, APPELLANT,

vs.

M. SALAMBIER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

1 United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
vs.
M. SALAMBIER, APPELLEE. } Suit No. 1215.

Certificate for instructions.

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the fourth day of January, 1895, by which it was ordered, adjudged, and decreed that there was no error in certain proceedings before the Board of United States General Appraisers, and that their decision be in all things affirmed, and an appeal having been duly taken from said judgment or decree to this court by the United States, and the cause having come on for argument in this court, a certain question of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision.

The facts out of which the question arose are as follows:

1. Certain merchandise consisting of sweetened chocolate in the form of small cakes or tablets manufactured from cocoa sweetened with
2 sugar, known commercially as sweetened chocolate, was imported and entered for consumption by the appellee, M. Salambier, from a foreign country into the port of New York on June 23, 1891, which merchandise was classified for customs duties at fifty per cent ad valorem by the collector of the port of New York under the provisions of paragraph 239 of the tariff act of October 1, 1890, and the duty was liquidated accordingly.

2. The importer and appellee protested against this exaction and duly filed the following protest:

"NEW YORK, *July 26th, 1891.*

Hon. JOEL B. ERHARDT, *Collector.*

SIR: I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91. Import entry 96,656.—M. S. No. 52/53.

I, claiming that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded.

Very respectfully,

M. SALAMBIER,
J. H. DUMONT, *Atty.*"

3. The collector of the port of New York thereupon transmitted the said protest with the invoice and entry to the Board of three General Appraisers on duty at the port of New York, and said Board on December 10, 1892, rendered their decision reversing the decision of the collector, and holding that the said merchandise was dutiable at 2
3 cents per pound under paragraph 319 of the tariff act of Oct. 1, 1890, and that the importer should not be deprived of his remedy

by reason of having failed to specifically claim classification of the said imported merchandise as a manufacture of cocoa under said paragraph 319.

4. From this decision of the Board of U. S. General Appraisers the United States appealed to the circuit court of the United States for the southern district of New York, by petition, praying for a review of said decision pursuant to section 15 of the act of June 10, 1890, claiming in their petition, among other things, that the said Board were in error in failing to hold that the protest in question was insufficient and invalid, inasmuch as it did not set forth distinctly and specifically the reasons for the importer's objection to the collector's decision as to the rate and amount of duties charged upon the merchandise according to the provisions of law; also in deciding an issue not raised by the protest or arising in the case; also in entertaining said protest and in failing to find the issue of law with the collector of customs; also in reversing the decision of the collector aforesaid in the premises.

5. The said circuit court, upon said petition, ordered the Board of U. S. General Appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, pursuant to section 15 of the act of June 10, 1890, and the said Board of General Appraisers thereafter made such return in conformity to the order of the court.

4 6. The case thereafter came on to be tried upon the record as above set forth and upon the invoice and entry, before Hon. Hoyt H. Wheeler, district judge holding the said circuit court. The circuit court affirmed the decision of the Board of General Appraisers herein and judgment was thereupon made and entered as above set forth, from which judgment the present appeal was taken by the United States to this court.

7. Upon these facts this court desires instruction upon the following question of law for the proper decision of said cause, namely:

Was the protest hereinabove set forth a good and sufficient protest under existing law against the decision of the collector in his assessment of duty upon the appellee's importation of sweetened chocolate, under the tariff act of October 1, 1890?

And to that end this court hereby certifies such question to the Supreme Court of the United States.

WM. J. WALLACE,
E. HENRY LACOMBE,
W. SHIPMAN,
Judges of the United States Circuit Court of Appeals for the Second Circuit.

5 UNITED STATES OF AMERICA,
Second Circuit, ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The United States, appellant, vs. M. Salambier, appellee (suit No. 1215), was duly filed and entered of record in my office by order of said court on the 18th day of December, 1895, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 31st day of January, in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States the one hundred and twentieth.

[SEAL.] JAMES C. REED,
Clerk United States Circuit Court of Appeals for the Second Circuit.

6 (Indorsed:) United States circuit court of appeals, second circuit. The United States, appellant, vs. M. Salambier, appellee. Suit No. 1215. Certificate for instructions. United States circuit court of appeals, second circuit. Filed Dec. 18, 1895. James C. Reed, clerk.

(Indorsement on cover:) Case No. 16169. Term No. 879. The United States, appellant, vs. M. Salambier. U. S. circuit court of appeals, second circuit. Filed February 1, 1896.

No. 117.

Brf. of Atty. Gen.l (Mayt.) for Appt

Filed April 25, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
M. SALAMEIER. } No. 117.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
M. SALAMBIER. } No. 117.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The brief for the appellee states correctly the facts upon which the question in the circuit court of appeals was certified in this case. The United States, however, disclaims the implications contained in the note and memorandum and the *italics* embracing "chocolate" and "sweetened chocolate," on pages 1 and 2 of his brief.

ARGUMENT.

I.

The only question here relates to the sufficiency of the protest.

The significant language of the protest is: "I, claiming that the said goods under existing laws are dutiable at 2 cents per pound and the exaction at a higher

rate is unjust and illegal, * * * claim to have the amount unjustly exacted refunded." The goods consisted of sweetened chocolate in tablets manufactured from cocoa and sweetened with sugar. The protest was against the duty assessed "on chocolate imported by me" (C'tf., p. 1). The question of the proper rate of duty on the goods is not really involved here, but the settlement of that rate may be briefly reviewed in order to reach a full understanding of the case.

In *Arthur* v. *Stephani* (96 U. S., 125) Mr. Justice Hunt shows that tariff legislation from an early day differentiated chocolate by duty *eo nomine* from confectionery. The tariff act of 1883 preserved the distinction (22 Stat., 502, 504), as did the act of 1890 (26 Stat., pp. 584, 588, pars. 238, 239, 318, 319), which, however, enlarged the classification by providing for "chocolate confectionery" (pars. 238, 239). Under the latter act the cases *In re Austin et al.* (47 Fed. Rep., 873) and *In re Schilling et al.* (48 Fed. Rep., 547; 11 U. S. App., 604) arose, and determined that "sweetened chocolate" was properly dutiable, not under paragraph 239 of the act of 1890, covering "all other confectionery, including chocolate confectionery," and the similitude clause of the act (sec. 5, p. 613) providing for the same duty on unenumerated articles similar in material, quality, texture, or use as upon enumerated articles which they most resemble; nor under paragraph 338, covering "chocolate other than chocolate confectionery and chocolate commercially known as sweetened chocolate," but under paragraph 319, covering "cocoa, prepared or manufactured, not specially provided for in this act."

In these determinations of the proper paragraph applicable to sweetened chocolate the United States has acquiesced, and does not question their correctness.

In the case of *Schilling et al.* no question of the sufficiency of the protest was raised. In the case of *Austin et al.* the importers in their protest relied upon paragraph 318, and the court determines that for this reason they can not avail of the provisions of paragraph 319. Both the foregoing cases determined that the parenthesis in paragraph 318, excepting "chocolate, commercially known as sweetened chocolate," as well as "chocolate confectionery," from its provisions, could not be changed under the rule of interpretation, disregarding punctuation in order to effect the obvious intent of the legislature, so as to include only the latter and exclude the former phrase, and thus subject "chocolate, commercially known as sweetened chocolate," to paragraph 318. Upon a similar protest, the ruling in the case *In re Austin et al.* was followed in *Cudenas & Co.* v. *United States.* (11 U. S. App. 792.)

So much for the proper rate of duty applicable and the insufficiency of protests in which classification under an inapplicable paragraph is mistakenly relied upon by the importer, notwithstanding the fact that the rate of duty under the inapplicable and the applicable paragraph is the same.

II.

But the question here is not as to the rate of duty, but as to the legal sufficiency of the protest under determinations of this court.

The Board of Appraisers were of opinion that the protestants having claimed that the merchandise was "chocolate or sweetened chocolate," should not under the circumstances be deprived of their remedy by reason of having failed to "*specifically* claim classification as manufactures of cocoa under paragraph 319." (Ctf., pp. 1, 2, sec. 3; appellee's brief, p. 5.) So far as the protest shows (and the question is as to the protest) the importers did not claim that the goods were "chocolate or sweetened chocolate," but that they were "chocolate." The court below (the circuit court) shows that the goods were invoiced as "chocolate and other manufactures of cocoa," and were returned by the appraiser as "sweetened chocolate as confectionery;" and the opinion concludes:

> As the goods were chocolate, and the rate claimed in the protest was the rate on that, it seems to set forth "distinctly and specifically" the reasons for the objection to a sufficient extent. [Citing *Arthur* v. *Morgan*, 112 U. S., 495.]

But the goods were not chocolate, but sweetened chocolate, and the mere fact that the rate applicable to chocolate under one paragraph, and to sweetened chocolate and other manufactures of cocoa under another, was the same, does not help the protest to set forth distinctly and specifically the reasons for the objections to the duty assessed. It may be admitted that to constitute a sufficient protest it is not essential to individuate the paragraph under which the claim is made, but it is necessary that the protest should set forth distinctly and specifically in some intelligible form the reasons for the objections, and the

* NOTE.—The case of *United States* v. *Salambier* (circuit court) does not appear to be reported. The citation above given is taken from the record of the case in the circuit court of appeals, page 12.

United States submits that, tried by this test, the protest herein was not good and sufficient under existing law.

III.

The requirements affecting a protest as laid down in section 14 of the customs administrative act have been long embodied in our statutes. A protest must be in writing and must set forth distinctly and specifically in respect to each entry or payment the reasons for the objections to the collector's decision as to the rate and amount of duties chargeable upon the imported merchandise. It is not necessary to ask the court to dwell upon the evolution of these requirements as drawn from previous legislation, nor to follow in detail the course of adjudication upon the subject. The laws governing protests have used the same language as to setting forth the objections since 1845, and this language passed over into the Revised Statutes and the customs administrative act without change. (Act of February 26, 1845, 5 Stat., 727; act of June 30, 1864, sec. 14, 13 Stat., 202; Rev. St., sec. 2931; *In re Sherman et al.*, 55 Fed. Rep., 276.) The adjudications of this court upon the subject prior to the act of June 10, 1890, are therefore of full authority on this case.

The principles determined applicable here are substantially as follows:

A protest against a rate of duty setting out the objection that the goods should have been assessed under another classification than the collector's is insufficient if in fact the assessment should have been made under a third classification as to which the protestant made no

claim; it makes no difference if the rate was the same under the classification claimed and the proper classification; the classification claimed must be indicated with reasonable clearness sufficient to point out which classification was intended, and the importer can not take advantage of a ground of objection not set out specifically in his written protest; a protest merely against a rate of duty is not sufficient. (*Mason* v. *Kane*, Taney, 173; *Thompson* v. *Maxwell*, 2 Blatchf., 385; *Davies* v. *Arthur*, 96 U. S., 148; *Herrman* v. *Robertson*, 152 U. S., 521; *Presson* v. *Russell*, 152 U. S., 577, and many cases in the courts below following these decisions in addition to those cited *supra*.)

The courts exact strict compliance with the conditions of a valid protest in order to apprise the collector of the nature of the objection before it is too late to remove it or modify the exaction, and that the proper officers of the Treasury may know what they have to meet in case they decide to disregard the objections and expose the United States to the risk of litigation. (*Davies* v. *Arthur*, *supra*.) Upon this point Chief Justice Taney, when sitting as circuit judge, says (*Mason* v. *Kane*, Taney 173, 177, 178, 179):

> The object of this provision is to prevent a party from taking advantage of such objections when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. * * * They [the United States] have granted this privilege * * * upon condition that the claimant * * * shall give a written notice that he regards the demand as illegal and means to contest the right of the United States

> in a court of justice, stating also at the same time distinctly the specific grounds upon which he objects. This is the condition upon which he is permitted to sue, * * * and thus to appeal from the administrative to the judicial department. * * * It is a condition precedent.

If a protest merely against a rate of duty is not sufficient, a protest simply claiming another rate without specifying in some way how or why it is applicable would appear on a parity of reasoning to amount to the same thing and to be equally futile. But the appellee claims that the protest here was sufficiently specific and apprised the collector of the nature of the objection. Let us examine it to see if this be so, and whether it meets the foregoing tests. It calls the goods "chocolate" when in point of fact they were sweetened chocolate. It protests against the rate assessed. It claims that the goods "under existing laws are dutiable at 2 cents per pound." That is all, for the remaining language is merely a corrollary or consequence of the foregoing—that the exaction of a higher rate is unjust or illegal, and that the protestant pays the duty to obtain possession and claims a refund. A protest could not well be more bare and uninstructive or less responsive to the legal requirements. It does not state a single reason why the duty assessed was wrong, or why another rate of duty was right.

Without dwelling on the fact that many articles under the act of 1890 besides sweetened chocolate (incorrectly called chocolate in the protest) were properly dutiable at 2 cents per pound, the importer can not read into his protest later decisions of the courts fixing the right rate

of duty and determining the paragraph properly applicable. The decisions in the *Austin* and *Schilling* cases are subsequent in date to the protest. The importer by his protest told the collector that he was wrong, but did not tell him wherein he was wrong; and the question is not whether the collector is right, but whether the importer is right. If we take the most liberal construction, and hold that the words of the protest used simply to designate the merchandise (but not to define or qualify it properly, for the designation was incorrect) are a part of the protest proper, then it may be held to read: "I claim that the merchandise is chocolate and is dutiable under existing laws at the rate of 2 cents a pound." But this certainly does not call the attention of the collector distinctly and specifically or with reasonable clearness to any particular paragraph under which the merchandise should be classed; or if it does, the paragraph pointed out by this language is paragraph 318, which is not the correct paragraph. The collector can not regard objections, however logically deduced, when the protest fails to make them in clear and precise terms. There is no authority to allow the importer to make a new protest. (*In re Sherman, Cecil & Co.*, 55 Fed. Rep., 276, 278.)

But, says the counsel for the appellee, there is a valid distinction to be made. It is true that protests that rely upon a paragraph not properly applicable, and which fail to point out the applicable paragraph, are to be held insufficient; but when the protest does not commit itself so far, but claims the right rate, and is silent as to the proper paragraph, or as to any provision for or indication of classification except the rate of duty, the protest,

nevertheless, does set forth the grounds of objection sufficiently. In other words, when, as a matter of fact, no other rate is applicable to the goods than the one named in the protest, and the rate assessed is complained of as illegal, the collector, who ought to know the law, and follows the rulings of the General Appraisers and the decisions of the courts (although both one and the other in this case were subsequent to the protest in time), is sufficiently apprised within the law; and the learned counsel calls attention to the cases of *Heinze* v. *Arthur's Executors* (144 U. S., 28) and *Herrman* v. *Robertson* (152 U. S., 521, 526) as illustrating this distinction. In the latter case the importers did not assert that the goods were not within the clause relied upon by the collector, except by claiming that they came under another portion of the same clause, which was likewise held to be incorrect. And it is to be pointed out in passing that the court said in that case: "The protest failed to point out, or suggest in any way, the provision which actually controlled," thus stating the Government's contention here.

But conceding for argument's sake that the case merely decides that a protest which specifies the wrong paragraph is insufficient, let us examine the case of *Heinze* v. *Arthur's Executors*. This case determined in effect that a protest which complained that goods "composed of cotton and silk, cotton chief part," should not be assessed with the duty on certain silk goods, "the duty on silk goods being only legal where silk is the chief part," distinctly and specifically called the attention of the collector to the ground of objection and the statutory provisions necessarily involved. We fail to see how any

consideration or comparison of this case supports the distinction which the counsel for the appellee seeks to draw. His argument amounts to this: although a protest which points out and relies on an inapplicable paragraph is insufficent, one which indicates no paragraph at all and specifies no cause for objection except that the rate assessed is erroneous and that another rate applies, is sufficient where the rate named is the proper rate (under a paragraph which covers the goods, not, however, indicated in the protest), although it may also be the proper rate under a distinct paragraph covering similar but different goods, because the importer has thereby done substantially all he ought to do or could reasonably do to apprise the collector of the nature and basis of his objection.

But the appellee can not so escape; he could and ought to have made an alternative claim by reference to both paragraphs 318 and 319, or by designating the merchandise covered by them respectively, in the list of one or the other of which his own goods should have been claimed to be included. He should have indicated with reasonable clearness which classification was intended, and then no criticism could have been passed on his protest and it would clearly have been sufficient.

IV.

The Government contends that the criticism contained in the foregoing rules laid down in the adjudicated cases is destructive to the validity of the appellee's protest.

To enforce this contention, it will be proper to consider briefly the language of some of the authorities and

to point out the distinctions between [illegible] and the one at bar.

In *Greely's Administrator* v. *Reagan* (18 How., 413, 417), in reference to a protest against advance of value on an invoice on the specifically stated ground of unfair and unfaithful examination by the appraisers, the court said:

> We are not therefore disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint, and his design to make it the foundation for a claim against the Government.

It is to be noted that Mr. Chief Justice Taney, in dissenting with Mr. Justice Daniel and Mr. Justice Nelson, was of opinion that the grounds of objection were not distinctly and specifically set forth, and that the protest did not apprise the collector of the objection taken.

Davies v. *Arthur* (96 U. S., 148) overthrew a protest on the ground that no objections to the duty assessed could be heard except those alleged in the protest, and reviews the pertinent principles and the decisions in which they were laid down. The language of the court is (p. 151):

> Technical precision is not required, but the objections must be so distinct and specific as when fairly construed to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the

defect if it was one which could be obviated. [Citing *Burgess* v. *Converse*, 2 Curtis, 223.]

Frazee v. *Moffitt* (20 Blatchf., 266) sustained a protest "against any greater rate of duties than at the rate of 10 per cent *ad valorem* for the reasons and on the grounds that no higher rate * * * can lawfully * * * be charged," because the rate assessed as well as the rate claimed were applicable to the merchandise under the same section of the Revised Statutes (sec. 2516), providing for duty on not enumerated unmanufactured articles on the one hand (which the court held properly included the merchandise) and on not enumerated manufactured articles on the other hand, into which class the collector claimed that the merchandise fell, the court saying that the collector having acted under the said section in imposing the higher duty, the language of the protest fairly referred him to the 10 per cent clause of the same section.

In *Arthur* v. *Dodge* (101 U. S., 34) the protest pointed out by reference to dutiable provisions why under then existing laws the assessment was erroneous, and hence sustained the protest as sufficiently notifying the collector of the true nature and character of the objection taken.

So by "personal effects used over a year" the court held that the protest in *Arthur* v. *Morgan* (112 U. S., 495) apprised the collector that a carriage claimed to be free was so claimed under clause 1 of section 2505 of the Revised Statutes as "household effects * * * used abroad for more than one year," and not under clause 2 or clause 3, neither of which contained the

limitation as to time of use. The collector, therefore, could not fail to understand the clause in mind.

In *Schell's Executors* v. *Fauché* (138 U. S., 562, 567), the protest claimed that under existing laws the goods were only liable to a duty of 19 per cent as a *manufacture of worsted*. The court held that the collector could have no doubt in his mind that the importer's intention was to object to the failure to classify the goods as a manufacture of worsted, and ruled that a protest which indicates to an intelligent man the ground of the importer's objection should not be discarded because of the brevity with which the objection is stated.

The cases of *Heinze* v. *Arthur's Executors* (144 U. S., 28) and *Herrman* v. *Robertson* (152 U. S., 521) have been sufficiently referred to *supra* in discussing the distinction raised by counsel for the appellee. The following quotation from the opinion of the court in the latter case is, however, applicable here:

> The protest failed to point out or suggest in any way the provision which actually controlled, and in effect only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable.

The fact that the rate was the same in the present case can not be made to "suggest the provision which actually controlled."

V.

Finally, the appellee earnestly claims that to hold the protest insufficient would be unjust as well as illegal, and refers to the appellee's equity.

This is not a case in which to seek for underlying equities; there are none. The reasons for holding importers to a strict compliance with the law are stated *ante* in the quotation from Chief Justice Taney in *Mason* v. *Kane*, and the other authorities cited. We think, in view of these reasons, one proper purpose of the law is protective to the Government, and that the decisions abundantly show that it is legal and not illegal to hold this protest insufficient; and if it is legal to hold it so, it is not unjust.

It is respectfully submitted on behalf of the United States that the question of the circuit court of appeals should be answered in the negative.

HENRY M. HOYT,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES		
AGAINST		No. 117.
SALAMBIER.		

BRIEF FOR APPELLEE.

Statement.

June 23, 1891, M. Salambier imported into New-York some small tablets made out of cocoa sweetened with sugar, *known commercially as 'sweetened chocolate.'* (Record, p, 1, folio 2.)

The then-existing tariff of 1890, contained three paragraphs to which the attention of the Court is invited, viz.;

Par. "318. Chocolate (other than chocolate confectionery and chocolate commercially known as sweetened chocolate) two cents a pound." (26 Stats. 588.)

[NOTE—*That Congress intended the parenthesis to end with 'confectionery' will be hereinafter mentioned.*]

Par. "319. Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound." *(Ibid.)*

MEMO. *These two are the only clauses of the act affixing this, two-cent, rate to cocoa, or chocolate, in any form, by itself or mixed.*

Par. " 239. All other confectionery, including chocolate confectionery, not specially provided for in this act, fifty per centum *ad valorem*." (26 Stats. 584, bottom.)

The collector levied duty (50%) upon these importations under this last-quoted paragraph (239); against which exaction the importer duly filed this protest, omitting date, address and signature—which were all correct;—

" I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91.

" Import entry 96656.—M. S. No. 52/53.

" I, claiming that the said goods under existing laws are dutiable at 2 cents per lb., and the exaction at a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded." (Rec. 1, fol. 2.)

The Board of General Appraisers reversed the collector's decision, and held " that the said merchandise was dutiable at two cents per pound under paragraph 319 [*sup.*] of the tariff act of Oct. 1, 1890, and that the importer should not be deprived of his remedy by reason of having failed to specifically claim classification of the said imported merchandise as a manufacture of cocoa under said paragraph 319." (Rec. 1, 2, fols. 2, 3, §3.)

The government took an appeal, alleging the insufficiency of the protest. The Circuit Court sustained the protest, and the Board's action thereon. (*Id.* 2 §§ 4, 5, 6.)

Upon further appeal taken to the U. S. Circuit Court of Appeals, this latter Court certifies to the Supreme Court this question, viz.;—

" Was the protest hereinabove set forth a good and sufficient protest under existing law against the decision of the collector in his assessment of duty upon the appellee's importation of *sweetened chocolate*, under the tariff act of October 1, 1890?" (Rec. 2, fol. 4; § 7.)

POINTS.

I.

Res adjudicata.

By *res adjudicata*, we do not mean that the facts as between the present parties, have been adjudicated; nor that there can be any estoppel against the United States; but only to indicate that, in a case where the controlling fact was substantially the same as here, the question of *law* here certified has been decided in favor of the importer and conformably to the present contention of the appellees.

Heinze v. Arthur, 144 U. S. 28.
Frazee v. Moffitt, 20 Blatch. 267.

If permitted, we will hand up ten copies of the bill of exceptions in the Heinze case, to obviate reference to the transcript of it in the Clerk's office; these ten being all left to us of those printed for use in the Court below.

It will be seen that the motion for a directed verdict for defendant, in Heinze case, was made and granted upon the ground of the omission to state in the protest that the goods were made on frames;—

"and that, while these were in force, at the time the protest was served, *many* provisions of law . . . providing for a duty of 35% which might be applicable to plaintiffs' goods, *there was nothing in the protest to show which one of them was relied upon by the importer.*"

For error in granting such motion, the judgment rendered below, upon such directed verdict, was reversed. (144 U. S. 28.)

In the opinion, per BLATCHFORD, it was observed;—

"The protest further claimed that the gloves were liable to a duty of only 35%, less10 %;—and [they] were, in fact *only liable to that duty*, whether liable to 30% under § 22 of the act of March 2, 1861 (12 Stats. 191) with the 5% added under § 13 of the act of

July 14, 1862 (*Id.* 555–7) or at 35% under the act of June 30, 1864 (13 *Id.* 208–9) with the reductions, as to all those provisions, under the act of June 6, 1872." (17 *Id.* 231.) Heinze v. Arthur, 144 U. S. 33, bottom.

Schell v. Fauché, 138 U. S. 568–9.

The 'they' interpolated in the second line of the foregoing quotation must be understood; and that word might properly have commenced a new sentence, omitting the 'and'; since, it must be remembered, *the protest* (found at bottom of page 29 and top of page 30 of the printed transcript of that case, No. 146, Oct. Tr. 1891,—copy herewith tendered) *contained no reference to either of the enactments* mentioned in the Opinion, *nor to any other*.

This omission was the ground of the Circuit Court's direction, in that case to find a verdict for the defendant.

In so directing, Judge LACOMBE only followed earlier rulings in that same Court; (24 F. R. 852, see 116 U. S., 375; 27 F. R. 651; 47 *Id.* 873; 49 *Id.* 224 *et als.*); but it was this tendency which the Supreme Court corrected in the Heinze case. The present effort of the government is to have this Court now sanction an unjust technicality, which it has heretofore condemned.

If (as in F. R. 873 and 49 *Id* 224) an importer told the collector his exaction was erroneous *because* another, specified, clause affixed the true rate, no recovery could be had if such specification were incorrect. In our brief in the Heinze case this distinction was carefully taken, and was subsequently declared in Herrman v. Robertson, 152 U. S., 526, bottom.

If the importer, however, merely states correctly the collector's error, adding naught to mislead him, this is sufficient. (144 U. S. 28.)

II.

Appellee's equity. Protest claims true rate.

That the collector imposed upon our goods a rate, and exacted from us a sum, not authorized by law is undisputed. The only controversy is whether the technical objection made by the District Attorney to our having back our own is tenable, and effective to bar our recovery.

The Board of General Appraisers found, (Dec. 10, 1892) "as matter of fact, that the merchandise in question consists of chocolate, in the form of small cakes or tablets, manufactured from cocoa, sweetened with sugar, but is not mixed with cream or fruits, or covered with sugar or other flavoring material. It is known commercially as sweetened chocolate" like that considered in the Board's decision of March 12, 1891. (Gen. Ap. Dec. 414; SS. 10,919.)

They add that it was assessed at 50% as chocolate confectionary, under par. 239, and is claimed to be dutiable at two cents a pound under existing laws.

The Board's Opinion concludes;—"The protestants having claimed that the merchandise was chocolate, or sweetened chocolate, and should be assessed at the rate at which it has been held to be dutiable by the Court, we are of the opinion they should not, under the circumstances, be deprived of their remedy by reason of having failed to *specifically* claim classification as a manufacture of cocoa, under Par. 319, and we accordingly sustain their claim," etc.

The Circuit Court's affirmance of the Board's action was accompanied by these observations, per

"WHEELER, J.—These goods were invoiced as 'Chocolate and Mfs. of Cocoa.' They were returned by the appraiser as 'Sweetened chocolate, as confectionery, 50%.' The importer protested 'against the rate of

50% assessed on chocolate, claiming that said goods under existing laws are dutiable at two cents per lb.' Chocolate was dutiable at two cents a pound. The General Appraisers assessed that rate. This appeal is taken for insufficiency of the protest. As the goods were chocolate, and the rate claimed in the protest was the rate on that, it seems to set forth 'distinctly and specifically' the reasons for the objection, to a sufficient intent. See Arthur v. Morgan, 112 U. S. 495."

The government's objection, as stated below with the emphasis of italics—so we suppose it likely to be the same here—was that "The protest is only against a rate of duty."

Perusal of the document shows this statement to be incorrect. After protesting against the illegal rate, the importer proceeds to claim and set forth the true rate—thus giving the Collector "a better writ"—and demands a refund of the *amount* unjustly exacted, as a consequence of adopting the wrong rate; to wit, the difference between 50% and two cents a pound. (Rec., p. 1, fol. 2.)

The applicable language of section 14 of the Administrative Act of June 10, 1890, reproduced from R. S., § 2931, is;—

"That the decision of the Collector *as to the rate and amount* of duties chargeable upon imported merchandise shall be final and conclusive, etc., unless the owner, etc., if dissatisfied with *such* decision [as to *rate* and amount] give notice in writing to the collector setting forth therein distinctly and specifically, and in respect to each entry, &c., the reasons for his objections THERETO"—i. e., to "the decision of the Collector as to the rate and amount."

The 'amount' is merely a mathematical application of the 'rate' to the ascertained value or quantity of the imports.

" "The importers were bound ONLY to state, *as* they they did, that the duty of 60% was illegal, and why *it* was illegal."

Heinze v. Arthur, 144 U. S. 34.
Houdlette, 48 F. R. 546.

In the present case, we had to state, as we did, why the fifty per cent exaction was illegal; to wit, because, the commodity being just what both parties knew it to be, two cents was the rate which chocolate (whether sweetened or not) should bear. It was not incumbent on us to state reasons why the article should pay two cents; "only" why it should *not* pay fifty per cent; although, the claim of that two-cent rate of itself indicated why the article should bear it, under one or the other of the only two, brief, consecutive paragraphs which affixed that rate to anything connected with chocolate.

Under which of these two paragraphs the demanded rate was to be applied was as immaterial in law as it would be to us in fact; as immaterial as it was whether the Heinze gloves were assessable under the act of March 2, 1861, etc., or under that of June 30, 1864, etc.

Heinze v. Arthur, 144 U. S. 33, bottom.

Perceiving the character of our goods, suppose the collector had assessed them at two cents a pound under par. 318: in that event, we should have had no more right in law than we should have had occasion in fact to protest because he had not applied that same rate under par. 319.

Rate (involving amount) is the all-important factor, which alone the law recognizes as issuable, in cases like the present, where the controversy is as to classification.

III.

Protest sustained by reason and precedent.

The error, corrected in the Heinze case, is in treating the protest as an isolated document; a narrative of all

the facts pertaining to the subject matter; instead of (as it is) one statutory step in a course of proceedings.

The course of proceedings, upon an importation, is well known to the Court, and given in detail in its opinion in Kimball v. Collector, 10 Wall. 436.

When entry is made, an invoice accompanies it, giving marks, numbers, value and contents of the entered packages. (1 McCulloch, Com. Dic. 207; Elmes, Customs, § 420). This is the document of vital importance in customs administration. (Gilp. 323, 17 How. *91; 3 Webst. Wks. 233.) Upon this the collector designates at least ten packages (or more, or all, if he likes) to go to the appraisers' stores for opening and examination. Though the appraiser conducts the examination, he does it under the direction and for the benefit of the Collector, to whom they report the facts ascertained by them. (10 Wall. 449, 450.) By General Treasury Regulations of 1884 (of which the Court takes judicial cognizance; 152 U. S. 212) in force at the date of our importations, Arts. 1408 and 1409 require the submission of samples with their report to the Collector, in all cases of doubt, together with the appraiser's opinion. Upon such information the Collector primarily bases his classification and his "decision" as to the rate and consequent amounts. If dissatisfied with that decision, *so reached*, the importer files with the Collector his protest against it;—not an essay, nor abstract discussion, nor directed against the reasoning, merely, of the customs officers, but to the conclusion arrived at by the Collector; briefly, but clearly, indicating the reasons of dissatisfaction with his "decision;" not with all his course of reasoning. It is a step in procedure. It calls a halt, and invites the collector himself, in the first place, to review what has been done theretofore. Naturally, this paper filed in compliance with statute, is supplemented by oral discussion, as this Court has noticed in treating of this subject. (18 How. 417 top.)

The reasons for being 'dissatisfied' are stated in writing; the argument in elaboration thereof is between man and man.

"The officers of the government on the one part, and the importer or his agent on the other, are brought into communication and intercourse *by the act of entry* of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, *therefore*, disposed to exact any nice precision," etc.

Greeley v. Burgess, 18 How. 417 top.
Schell v. Fauché, 138 U. S. 568 top.
Maillard v. Lawrence, 3 Blatch. 381.
Vaccari v. Maxwell, *Ibid.* 374, where the Court notices that the protest is to be read in connection with the invoice and entry, etc.

Every writing is construed according to accompanying circumstances. This statutory notice is to be "in respect to each entry" (26 Stats. 137); connected with it. If the collector adheres to his decision, he is to forward to the Board of General Appraisers the invoice and all the papers and *exhibits* [samples] *connected therewith (Ibid.)*; these, taken altogether, constituting the case upon which he has made his decision, and upon which the Board is to act.

When we consider what the present case really was, the concluding sentences of the Chief-Justice's opinion, in Arthur vs. Dodge, are seen to be applicable:—"We have had no difficulty in reaching the conclusion that the protest in this case fully meets the requirements of this rule. No one could have any doubt of the nature and character of the claim that was made." 101 U. S. 37.

Let us consider:—

(1.) What was *the subject* of examination and decision by the collector:—

(2.) *His error*, as to that subject:—

(3.) Whether our protest sufficiently indicates *that* error.

(1.) The *subject* to which the collector's attention was invited, in the discharge of his official duty, was an importation of "sweetened chocolate, in the form of small cakes or tablets, sweetened with sugar, *known commercially as sweetened chocolate*." (Rec. 1, fols. 1, 2, § 1.)

They were entered as "Chocolate and Mfs. Cocoa." That the article was chocolate which had been 'sweetened with sugar' was apparent to the senses, and is not in dispute. *(Ibid.)*

The perceived presence of the sugar gave rise to the only controversy between the importer and collector; *as to the legal effect* of the known fact of it being sweetened. The question was that raised in Arthur v. Stephani:—"Was it dutiable as confectionery or as chocolate," or as a manufacture of cocoa? (96 U. S. 126.) In that case, the opinion shows a distinction made in every tariff, from 1792 down, between chocolate (sweetened or not) and confectionery. *(Ibid.* 127.) The several provisions of the act of 1890 (pars. 239, 318, 319) bearing upon the controversy—as to the proper legal conclusion from the admitted facts—are pertinent to be considered here; but they may be more satisfactorily discussed in a subsequent, separate division of this brief *(Post*, pp. 14 to 16), though here mentioned as pertaining to the subject of the collector's inquiry and decision. That subject will then be seen not to have been new to him, at the date of our importations. It had been acted upon by him, and his action had been the subject of diverse discussion: so he fully understood the issue—whether or not this sweetened chocolate should be dutied under par. 239—if not, it *must* be dutiable at two cents a pound under par. 318, or 319, no other clauses having any bearing upon chocolate.

(2.) The collector's error—now admitted to be one, since the only question is the sufficiency of the protest, no issue of fact arising upon the appeal—was in applying par. 239, act of 1890, to our goods, and assessing 50% duty upon them as confectionery;—or as "chocolate confectionery;"—which the Board of Appraisers and Circuit Court have found, upon the facts proven, they were not.

(3.) That error, of the character which it was, was indicated by our protest. The importer first protests against the 50% rate assessed upon his chocolate; and then tells the collector that the claim is that, under existing law, two cents a pound is the rate at which the goods are dutiable, and the exaction of any higher rate is unjust and illegal. (Rec. 1, fol. 2, § 2.)

The collector knew the imported article, and its constituents. He was bound to know the law; that two cents was the only rate the goods could bear, if his assessment were wrong; and that the two-cent duty must accrue under par. 318 or 319, it being utterly immaterial to everybody under which of them it was collected.

A similar protest was held good by Judge BLATCHFORD. Hay was assessed, under § 2516, at 20%, as a nonenumerated manufacture. The protest was against any greater or higher rate than ten percentum on the ground than no higher rate than 10% can be charged on hay imported. No section was mentioned; but Judge BLATCHFORD said the collector, with the law before him, could not fail to know that the claim was made under § 2516; though hay was not specified in that section. Neither did the protest state that the hay was dutiable as "unmanufactured," though that was the ground upon which Judge BLATCHFORD gave judgment for the importer. Frazee v. Moffitt, 20 Blatc. 269.

Sec. 2516 was no more in that collector's mind than pars. 318–9 *must* have been in mind when our protest was received.

So in an earlier case in the same court, where the protest was against the decision, claiming to recover the difference between the exaction and what ought to have been charged.

Maillard v. Lawrence, 3 *Id.* 378.

MEM: This is not the case reported in 16 Howard.

Lowenstein v. Maxwell, 2 Blatc. 403.

The decision (Arthur v. Morgan, 112 U. S. 495) cited by Judge WHEELER, seems conclusive of the present question, just as he considered it; especially when we perceive the status of the law and facts concerned in that decision.

June 30, 1876, the Attorney-General advised the Treasury Department that carriages were not "*household* effects" within the meaning of the free list (15 Atty.-Gen. Op. 125); and thereafter they were held liable to duty (112 U. S. 499 top). Undoubtedly, this opinion led Mrs. Morgan's agent to enter her carriage as '*personal* effects,' and to claim exemption under that designation, and as being such "in actual use." "Books, household effects," etc. are enumerated in the revision (second edition) at the top of page 484, followed by an alphabetical list of sundries, from 'Borate of Lime' to 'Wax,' covering five and a half pages, until, on page 489, we find "Wearing apparel, *in actual use*, and other *personal* effects." Her protest claimed exemption as "personal effects in actual use." (112 U. S. 496)

The court held that free entry, as a carriage used more than a year, under § 2505, was the thing claimed; that *household* effects must have been in the party's mind, as well as the collector's; and the latter "could not fail to understand" the protest, which was sufficient.

Arthur v. Morgan, 112 U. S. 501.
Schell v. Fauché, 138 *Id.* 568-9.

The collector classified our goods as 'confectionery.' He "could not fail to understand", not only

that we protested against this, but claimed the two-cent rate on account of the principal material, to which the sugar was accessary. His mind and the importer's *must* have been drawn to paragraphs 318 and 319, the only ones affixing to such material a two-cent rate;—much more certainly than in the Morgan case. The only objection made to our protest is that these numerals (or 319) were not inserted. Both might have been claimed, in alternative; but that would not really have enlightened the collector one particle as to the basis of our claim. It would have been useless verbiage. He understood perfectly wherein and whereby we were dissatisfied.

"A protest that indicates to an intelligent man the ground of the importer's objection *to the duty levied* upon the articles, should not be discarded because of the brevity with which the objection is stated". Schell v. Fauché, 138 U. S. 569.

The injustice of the government's contention can never receive any more forcible illustration than in this cause. The collector levies 50%. It is now conceded, our claim of two cents a pound stated the correct rate. The Board of Appraisers, solely engaged in applying eminent abilities to these questions, agree that this rate accrues under par. 318; the single judge of the Circuit Court thought this two-cent rate accrued under par. 319; the two judges holding the Circuit Court of Appeals, *agreeing upon this rate, disagree as to the paragraph* under which it accrues, Judge WALLACE agreeing with the Board that par. 318 applied, and Judge SHIPMAN sustained the Circuit-Court ruling, that par. 319 applied; though agreeing with Judge WALLACE and the Board that there was a clerical mistake, in including "sweetened chocolate" within the parenthesis of par. 318, yet considers the Court bound by the punctuation; so the Circuit Court judgment was affirmed by a divided appellate court; and, of the six gentlemen, learned in the law, who acted judicially

upon this question, circumstances led the opinion of two to prevail over that of the other four, and prevented the refund of a tax that all six agreed should not have been exacted. U. S. v. Schilling, 11 U. S. Ap. 603, 612. Yet it is now argued we must pay the rate everybody concedes to be wrong, against which we protested, because we did not either uselessly refer to both paragraphs, inserting a claim under each, or else hazard a guess between them, and fix upon par. 319.

Any such conclusion is a libel upon the name of *justice*.

IV.

Pars. 318 and 319.

Our protest was by no means the first to call the collector's attention to the subject of the proper classification of "sweetened chocolate." His assessment of prior importations had been reviewed by the Board and the courts and, unanimously, by these declared erroneous—and that two cents was the true rate of duty thereon.

Justice HUNT'S opinion, in Arthur v. Stephani, 96 U. S. 125, shown that from May 2, 1792, down Congress has discriminated between chocolate (though sweetened) and confectionery. The act of 1883 preserved this distinction, putting on "Chocolate, two cents a pound; cocoa, prepared or manufactured, two cents a pound" (22 Stats. 504); on sugar-candy, five cents; other confectionery, five cents; if worth over thirty cents, 50% *ad valorem*. (*Ibid.* 502.) It made no difference whether the chocolate, or cocoa, was sweetened or unsweetened. "Sweetened chocolate" is mentioned, for the first time in any tariff, in this par.

318 of the act of 1890; if not dutiable under that clause, it is nowhere specifically listed for duty, *eo nomine*.

Paragraph 318 *(ante*, p. 1*)* puts upon "chocolate" "(other than chocolate confectionery and chocolate commercially known as sweetened chocolate)" two cents a pound.

"Chocolate confectionery" by that act is dutiable at 50% *ad val.*, under par. 239, which the Collector applied to our goods. Austin, Nichols and Co. protested against such application to their similar importation, and (Mar. 12, 1891) the Board of Appraisers, in an opinion by Judge SOMERVILLE, sustained the protest, on the ground that the parenthesis should close with the word 'confectionery; and so correcting the punctuation, the goods in question were dutiable under par. 318, as claimed. (88. 10,919: G. A. 414.) This view was supported by the consideration that, otherwise, an enumerated article would be left without specification of duty, it not being named in the confectionery clause; and, it was stated, *arguendo*, in that case, that the bill as reported showed the punctuation as corrected; and that, subsequently to the enactment, a resolve making this correction passed the House, but did not get through the Senate.

Am. Net etc. Co. v. Worthington, 141 U. S. 473–4;
Jennison v. Kirk, 98 *Id.* 459, 460;
Blake v. Banks, 23 Wall. 31;
Collector v. Richards, *Ibid.* 258, bottom.

This action of the Board was reversed by the Circuit Court, which held the punctuation, as it is, must control; that the Austin goods were dutiable under par. 319; and as their protest claimed under par. 318 it must fail.

The same ruling was made in the later case of Schilling, to which we have just above referred.

Austin, 47 F. R. 873.
Schilling, 48 *Id.* 547.

As recited at the end of the next preceding division of this brief, by a divided court, only two judges sitting, the U. S. Circuit Court of Appeals affirmed the Schilling case, while stating the facts showing the placing of the parenthesis is, really, but a clerical error, defeating congressional intention.

U. S. v. Schilling, 11 U. S. Ap. 603, 612.
Cadenas (no op.) 8 C. C. A. 679.

In the Cadenas case, we were beaten because the protest claimed *only* under par. 318; the Court considering this to come within Herrman v. Robertson, 152 U. S. 521, and similar decisions; in the present case, the Circuit Court held in our favor, as within the rulings in the Heinze and Morgan cases. The Chief-Justice, in the Herrman case, observed that the protest did not "in *any way* suggest the provision which actually controlled," while it did suggest an entirely different contention. (152 U. S. 226 bottom.) In this case, much more plainly than in Morgan's, we did indicate the reasons for being dissatisfied with the collector's classification and assessment, and did "*suggest* the provision which actually controlled," though without indicating its numeration.

V.

Summary.

When our goods were imported and examined, their composition was apparent. The tongue recognized their sweetness. *De gustibus, non*, etc. Because of this attribute, the collector treated them as 'confectionery,' 50%. Our protest declared they were not 'confectionery'; and, therefore, were dutiable at only two cents a pound, demanding a refund of the differ-

ence. Our claim was right, our demand just, and should have been acquiesced in. The collector rejected them solely because we had not put in "par. 319." The Board and Circuit Court held this too technical; since the reasons of our position were sufficiently apparent to the collector, familiar with the subject and controversy.

The sole question now is, whether this, the only just, conclusion is not also the correct legal one.

VI.

The Question's Answer.

The submitted question should be answered affirmatively, and the decisions of the Board and of the Circuit Court sustained.

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Of counsel for appellee.

UNITED STATES *v.* SALAMBIER

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 117. Submitted May 6, 1898. — Decided May 23, 1898.

A protest by an importer, addressed to the collector and signed by the importer saying, "I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91. Import entry 96,656. — M. S. No. 52/53, I claiming that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal. I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded," is, in form and substance a sufficient compliance with the requirements of section 14 of the act of June 10, 1890, c. 407, 26 Stat. 131, 137.

A JUDGMENT or decree of the Circuit Court of the United States for the Southern District of New York having been made and entered on the 4th day of January, 1895, by which it was ordered, adjudged and decreed that there was no error in certain proceedings before the board of United States general appraisers, and that their decision be in all things affirmed, and an appeal having been duly taken from said judgment or decree to the Circuit Court of Appeals by the United States, and the cause having come on for argument in that court, a certain question of law arose concerning which that court desired the instruction of the Supreme Court of the United States for its proper decision.

The facts out of which the question arose are as follows:

Certain merchandise consisting of sweetened chocolate in the form of small cakes or tablets manufactured from cocoa sweetened with sugar, known commercially as sweetened chocolate, was imported and entered for consumption by the appellee, M. Salambier, from a foreign country into the port of New York on June 23, 1891, which merchandise was classified for customs duties at fifty per cent ad valorem by the collector of the port of New York under the provisions of paragraph 239 of the tariff act of October 1, 1890, and the duty was liquidated accordingly.

The importer and appellee protested against this exaction and duly filed the following protest:

"NEW YORK, *July* 26, 1891.

"Hon. JOEL B. ERHARDT, *Collector*.

"Sir: I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91. Import entry 96,656. — M. S. No. 52/53.

"I, claiming that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded.

"Very respectfully, M. SALAMBIER,
"J. H. DUMONT, *Atty*."

The collector of the port of New York thereupon transmitted the said protest with the invoice and entry to the board of three general appraisers on duty at the port of New York, and said board on December 10, 1892, rendered their decision reversing the decision of the collector, and holding that the said merchandise was dutiable at 2 cents per pound under paragraph 319 of the tariff act of October 1, 1890, and that the importer should not be deprived of his remedy by reason of having failed to specifically claim classification of the said imported merchandise as a manufacture of cocoa under said paragraph 319.

From this decision of the board of United States general appraisers the United States appealed to the Circuit Court of the United States for the Southern District of New York, by petition, praying for a review of said decision pursuant to section 15 of the act of June 10, 1890, claiming in their petition, among other things, that the said board were in error in failing to hold that the protest in question was insufficient and invalid, inasmuch as it did not set forth distinctly and specifically the reasons for the importer's objection to the collector's decision as to the rate and amount of duties charged upon the merchandise according to the provisions of law; also

in deciding an issue not raised by the protest or arising in the case; also in entertaining said protest and in failing to find the issue of law with the collector of customs; also in reversing the decision of the collector aforesaid in the premises.

The said Circuit Court, upon said petition, ordered the board of United States general appraisers to return to the Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, pursuant to section 15 of the act of June 10, 1890, and the said board of general appraisers thereafter made such return in conformity to the order of the court.

The case thereafter came on to be tried upon the record as above set forth and upon the invoice and entry, before Hon. Hoyt H. Wheeler, District Judge holding the said Circuit Court. The Circuit Court affirmed the decision of the board of general appraisers herein and judgment was thereupon made and entered as above set forth, from which judgment the present appeal was taken by the United States to this court.

Upon these facts that court desired instruction upon the following question of law for the proper decision of said cause, namely:

"Was the protest herein above set forth a good and sufficient protest under existing law against the decision of the collector in his assessment of duty upon the appellee's importation of sweetened chocolate, under the tariff act of October 1, 1890?

"And to that end that court hereby certifies such question to the Supreme Court of the United States."

Mr. Assistant Attorney General Hoyt for the United States.

Mr. Edwin B. Smith for Salambier.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

It was decided by the United States Circuit Court of Appeals for the Second Circuit, in *United States* v. *Schilling*, 11 U. S.

App. 603, that "sweetened chocolate" was dutiable under paragraph 319 of the tariff act of October 1, 1890, at the rate of two cents per pound, as "cocoa, prepared or manufactured, not especially provided for in the act."

From that decision the United States took no appeal. In the present case, the board of general appraisers held that "sweetened chocolate" was dutiable at the rate of two cents per pound under said paragraph 319. The United States appealed from the decision of the board of appraisers to the Circuit Court of the United States for the Southern District of New York, not on the ground that the merchandise in question was not properly dutiable, under paragraph 319, at two cents per pound, but claiming that the protest made by the importer against the decision of the collector, who had assessed the sweetened chocolate, under paragraph 239 of said act, at fifty per cent ad valorem, was not a sufficient protest under existing law. From the judgment of the Circuit Court affirming the decision of the board of general appraisers an appeal was taken by the United States to the Circuit Court of Appeals, and that court has certified to us the single question of the legal sufficiency of the protest which, omitting unnecessary words and figures, was as follows:

"I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23, '91. . . . I, claiming that the said goods under existing laws are dutiable at two cents per pound, and the exaction of a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods and claim to have the amount unjustly exacted refunded."

By the fourteenth section of an act approved June 10, 1890, 26 Stat. 131, entitled "An act to simplify the laws in relation to the collection of the revenues," Congress enacted —

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, (except duties on tonnage,) shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee or agent of such merchandise,

or the person paying such fees, charges and exactions, other than duties, shall, within ten days after, 'but not before,' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

The three paragraphs concerned are as follows:

239. "All other confectionery, including chocolate confectionery, not specially provided for in this act, fifty per centum ad valorem."

318. "Chocolate, (other than chocolate confectionery and chocolate commercially known as sweetened chocolate,) two cents a pound."

319. "Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound." 26 Stat. 584, 588.

It is not claimed on behalf of the Government in the present case that the protest was not made in writing by a person entitled to do so; or that it was not made within due time; or that the requisite payment under protest has not been duly made. In other words, it is conceded that the importer, within the time prescribed in the statute, and having paid the full amount of the duties exacted, gave notice in writing to the collector that he was dissatisfied with his decision, and gave certain reasons for his objections thereto.

What is claimed by the Government is that the nature of the importer's objections to the decision of the collector was not set forth with the distinctness and with the minuteness of specification required by the statute.

It does not appear that the collector deemed the protest insufficient in form or unintelligible. Not complaining of any want of distinctness in the protest, he adhered to his decision as to the nature of the merchandise and the amount of the duty, and, in pursuance of the statute, transmitted the protest

with the invoice and entry to the board of general appraisers. The board regarded the protest as sufficient in respect to form and distinctness, reversed the decision of the collector and held that the merchandise was dutiable at two cents per pound under paragraph 319 of the tariff act.

As already stated, it is admitted by the Government that the collector was wrong in his classification of the imported article, and that the duty assessed by the board of general appraisers is the one that should have been exacted from the importer. Still, it is contended that the importer has lost his remedy by reason of having failed to specifically claim classification of the imported merchandise as a manufacture of cocoa under said paragraph 319.

Apart from the authorities cited, and which we shall presently examine, we have no difficulty in agreeing with the board of appraisers, and with the Circuit Court, that the protest was, in form and substance, a reasonable compliance with the law. The object of the statute, in requiring a protest, was to distinctly inform the collector of the position of the importer. In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act, at fifty per cent ad valorem, was objected to, and that the importer claimed that, under the law, the goods were dutiable at two cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound.

The conclusion thus reached is consistent with the authorities to which our attention has been called in the briefs of the respective parties:

"We are not disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his

design to make it the foundation for a claim against the government." *Greely's Administrator* v. *Burgess*, 18 How. 413.

"Persons importing merchandise are required to make their protests distinct and specific, in order to apprise the collector of the nature of the objection, before it is too late to remove it, or to modify the exaction, and that the proper officers of the Treasury may know what they have to meet, in case they decide to exact the duties as intimated, notwithstanding the objection, and to expose the United States to the risk of litigation." *Curtis's Administratrix* v. *Fiedler*, 2 Black, 461.

"The object of the requirement is to prevent a party, if he suffers a mistake or oversight to pass without notice, from taking advantage of it when it is too late to make the correction, and to compel him to disclose the grounds of his objection at the time when he makes his protest. . . . Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated." *Davies* v. *Arthur*, 96 U. S. 148.

"A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure." *Arthur* v. *Morgan*, 112 U. S. 495.

"A protest which indicates to an intelligent man the ground of the importer's objection to the duties levied upon the articles should not be discarded because of the brevity with which the objection is stated." *Schell's Executors* v. *Fauché*, 138 U. S. 562; *Heinze* v. *Arthur's Ex'rs*, 144 U. S. 28.

In *Herrman* v. *Robertson*, 152 U. S. 521, a protest was held insufficient, in that it failed to point out, or suggest in any way, the provision which actually controlled, and in effect only raised a question which of two clauses, under one or the

other of which it was assumed that the importation came, should govern as most applicable.

Under these and other authorities which we have examined, we conclude that the notice was sufficient, and accordingly answer the question certified to us by the Circuit Court of Appeals in the affirmative, and it is so ordered.